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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1938

No. 952 49.

GEORGE W. GRIFFITHS
(Petitioner) Appellee,

vs.

COMMISSIONER OF INTERNAL REVENUE
(Respondent) Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DELBERT A. CLITHERO,
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HERMAN A. FISCHER,
CARLTON L. FISCHER,
Of Counsel.

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(*Respondent*) *Appellant.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, appellee below, prays that a writ of certiorari issue to review the final order entered February 25, 1939 (rehearing denied April 15, 1939) by the United States Circuit Court of Appeals for the Seventh Circuit (Judges Sparks, Major, and Treanor) reversing a decision of the United States Board of Tax Appeals which had been promulgated on February 9, 1938.

(1) Summary Statement of the Matter Involved.

Petitioner commenced this case by filing a petition with the United States Board of Tax Appeals seeking the review of a proposed deficiency of $61,219.97 in the petitioner's individual income tax for the year 1933. The only contested issue arises from the proposed inclusion, as the petitioner's individual income, of $73,558.93 profits realized by G. W. G. Corporation, a company wholly owned by the taxpayer, from the sale of 5000 shares of stock in Oakridge Cemetery Corporation.

In the year 1926 the petitioner had purchased these 5000 shares of stock from or through one Lay at a cost of $100,000. In 1931 he had claimed and been allowed a deduction of $92,500 as a loss realized from its sale to John Griffiths Investment Trust for $7,500.00.

In the latter part of 1932, petitioner acquired information that fraud had been practiced upon him in 1926 when he purchased this stock. One Markheim, petitioner's attorney, undertook investigation and negotiation, and later reported that a settlement was in prospect which would include the resale of this stock to Lay and a release of petitioner's cause of action for fraud. On his advice petitioner repurchased the stock from the trust for $8,000 so that ownership was combined in him of stock and of claim for fraud.

Markheim at the same time told petitioner that he might postpone the payment of income taxes, on the profit from the settlement, and limit their amount, if an investment company should be organized to which petitioner would sell the stock and the cause of action on an installment basis, which company would make the settlement and then use

the proceeds in its business. The petitioner had already considered forming an investment corporation or association; and he then instructed Markheim to proceed.

G. W. G. Corporation was organized on January 10, 1933, petitioner being its sole stockholder. Immediately following its organization, its Directors approved an agreement by which petitioner sold to it the 5000 shares of stock and assigned to it such rights as he might have to require Lay to repurchase the stock; and G. W. G. Corporation agreed to pay petitioner therefor the sum of $85,000. Payment was to be made, $1,000 down, $1,125 five days later, and $2,125 on the fifteenth day of January of each year thereafter, deferred installments bearing 3% interest.

Markheim finished his negotiations; and on the following day a settlement contract was completed and executed. Thereupon, Markheim received from Lay two checks, one for $80,000 (arising from other matters), and one for $100,000. The latter check was endorsed by petitioner to G. W. G. Corporation; and the next day it was deposited in an account which that company had opened two days before in National Builders Bank of Chicago.

G. W. G. Corporation proceeded to obtain a license to transact business in the State of Illinois. During the remainder of the year 1933 it made investments in various securities in amounts totaling over $175,000. The record (Rec. 59) gives the different items purchased, and the dates and proceeds of the sales of such thereof as had since been sold; and it shows (Rec. 57) the first page of the corporation's bank deposit book reflecting cash receipts during the first four years.

In his 1933 income tax return petitioner reported this stock transaction as a sale on an installment basis, returning $1,875 (of the $2,125 collected on principal in that year) as profit realized, and $75,000 as profit as yet unrealized.

Petitioner also returned $20,000 received as dividends from G. W. G. Corporation, $10,000 received as salary as its Treasurer, and interest received as $1,436.15. The latter item presumably included $1,243.13 of interest on the deferred payments, received from G. W. G. Corporation in December 1933.

The Commissioner would treat the sale to Lay as by petitioner individually, at the same time including, in petitioner's income, these items of receipt from the corporation. The Commissioner stated his reason for the increase in income as follows:

> "The alleged assignment of this stock to G. W. G. Corporation (organized on the day of the sale, January 10, 1933) has been ignored, and the transaction treated as a sale by you, for your own account" (Rec. 7).

The United States Board of Tax Appeals, in its opinion promulgated on February 9, 1938 (six members dissenting), made the following statement:

> "It requires careful scrutiny to see if there is any sufficient reason to disregard the corporate entity, which normally under the law must be recognized as a separate taxpaper from the petitioner. It is not fatal in such cases that the corporation shall use means deliberately to minimize income tax. Here one taxpayer, the petitioner, made an actual bona fide sale to another. His income tax liability arises under that transaction rather than as a result of the settlement with Lay. This new corporation continued to exist, as indeed was necessary in order to carry the installment sale contract. It paid a salary and dividends to the petitioner, which he reported in

his income tax return. It paid him interest on the unpaid purchase price, which he may have reported on his income tax return. The Commissioner has not eliminated the salary and interest, as should be done if the separateness of the corporation is to be ignored. The steps taken and the reality of the corporation cannot be disregarded" (Rec. 67).

On petition by the Commissioner, the United States Circuit Court of Appeals for the Seventh Circuit reversed the decision of the Board of Tax Appeals, treating the resale to Lay as an individual transaction on the authority of *Gregory* v. *Helvering*, 293 U. S. 465, and saying:

> "Here, as there," (in *Gregory* v. *Helvering*) "the sole object was the consummation of a preconceived plan not to organize a corporation for a business purpose, but merely as a step in the contrivance to escape taxes. It performed, as was intended from the beginning, no other function, *with the possible exception of the subsequent transaction of some business not inconsistent with the scheme of which it was a part.*" (Italics ours.) (Rec. 88.)

(2) Jurisdiction.

The opinion of the Circuit Court of Appeals was rendered February 25, 1939. Petition for rehearing was denied on April 15, 1939, and mandate issued on April 24, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938). The petition is filed in accordance with Rule 38 of this Court. Under Section 8 (a) of the Act of February 13, 1925 (43 Stat. 940) this petition must be filed within three months after the entry of the judgment to be reviewed.

3. Questions Presented.

This cause presents the following questions:

(1) Whether, in determining individual income tax, the legal entity of a corporation may be disregarded, and its transaction treated as that of its stockholder, simply because a tax saving motive attended its organization.

(2) Whether the receipt of funds by a corporation may be treated as constituting income taxable to its sole stockholder, because of his practical control over its affairs.

(3) Whether a Circuit Court of Appeals may substitute its conclusions of fact for those of the United States Board of Tax Appeals; and whether it may at the same time disregard such of the Board's findings of fact as conflict with its own conclusions.

Petitioner suggests that the decision of the Circuit Court of Appeals of the Seventh Circuit, in respect to the first two questions, conflicts with decisions of the Circuit Courts of Appeals of other Circuits, and is based on a misconception of a decision of this Court; also that the third question is a Federal question, in respect to which the Circuit Court's decision is in direct conflict with applicable decisions of this Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has in this case interpreted this Court's decision in the case of Gregory v. Helvering, 293 U. S. 465, as establishing the principle that the existence of a corporation, as an entity separate from its stockholders, may be disregarded merely because a tax-saving motive led to its organization.

The United States Board of Tax Appeals in the instant case (Rec. 67-68) had cited decisions by five Federal Courts of Appeals and eight decisions of the United States Board of Tax Appeals, for the proposition that the separate corporate entity could not be disregarded because of the presence of a tax-saving motive. Its reversal by the Circuit Court of Appeals for the Seventh Circuit discloses a striking conflict between the law as interpreted by that Court of Appeals and the law as interpreted by the Courts of several other Circuits, and that with respect to the important and constantly recurring problems involved in the classification of transactions as corporate or individual.

The effect of such a conflict is illustrated by a comparison of the instant case with the *Chisholm* case (discussed both by the Circuit Court and by the Board in the instant case). On closely parallel facts the Board in that case found for the Commissioner on exactly the theory adopted by the Circuit Court in this case (29 B.T.A. 1334). The Circuit Court of Appeals for the Second Circuit (79 F.C.A. 2d 14) then reversed the Board on the strength of that Court's interpretation of *Gregory* v. *Helvering*. In the instant case the Board accepted that interpretation; and it finds itself again reversed, this time by the Circuit Court of Appeals for the Seventh Circuit.

2. This decision classes the mere receipt of funds by a corporation in a corporate transaction as constituting income to its sole stockholder.

We quote from the Circuit Court's decision in the instant case:

> "Rather than designating respondent as the agent of the corporation, it is more apt to designate the corporation as the agent of respondent. It was he who was responsible for its organization, who owned all of its stock and whose directors were office associates of its counsel. He was the guilding and controlling genius, rather than the corporation." * * * "We think there is merit to the contention that the income was actually received by the taxpayer in his individual capacity, but if not, it was merely diverted into his corporate pocket, of which he was sole proprietor, and syphoned on the installment basis into his individual pocket" (Rec. 89).

The Board has called attention to the fact that the Commissioner's determination in this case involves not only the taxation to an individual of funds when they enter his "corporate pocket," but a second taxation when they pass from that "pocket" to his other pockets.

3. This case involves important questions of the relative jurisdictions, authority, and functions of the United States Board of Tax Appeals and of Circuit Courts of Appeals.

In this case the Circuit Court of Appeals has in effect disregarded findings of fact by the United States Board of Tax Appeals; and in addition it clearly has drawn its own conclusions of fact,—in direct conflict with the conclusions of fact of the United States Board of Tax Appeals.

These considerations are covered more exactly in the brief which follows, but we give here one illustration:

> "In the instant case, it is our view that what was done, including the corporate organization, was a mere mask to cover the real transaction." (From opinion of Circuit Court of Appeals) (Rec. 90).
>
> "The steps taken and the reality of the corporation cannot be disregarded." • • • "This petitioner had sold and transferred his stock and the claim against Lay before the settlement with Lay had reached the stage where it had any income tax significance." • • • "The petitioner was not entitled to the $100,000 and the gain from the transaction cannot be taxed to him." (From opinion of United States Board of Tax Appeals) (Rec. 67-68).

Even more important than the need for uniform criteria to be applied in construing corporate action, is the conflict of judicial views, as to the finality of the findings and conclusions of fact of administrative and quasi-judicial tribunals, to which this decision directs attention. This problem is not confined to the judicial review of the decisions of the Board of Tax Appeals. Its solution should measurably lighten the volume of appeals by eliminating those involving only issues which are not reviewable.

Wherefore your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court to review the decision of the Circuit Court of Appeals for the Seventh Circuit, and that the order of said Court be reversed.

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HERMAN A. FISCHER,
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Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1938.

GEORGE W. GRIFFITHS,
(Petitioner) Appellee,

VS.

COMMISSIONER OF INTERNAL REVENUE,
(Respondent) Appellant.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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(1) The Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit will, it is believed, be reported in 102 Fed. 2nd. The opinion of the United States Board of Tax Appeals is reported in 37 B. T. A. at page 314.

2. Grounds On Which Jurisdiction Is Invoked.

In interest of brevity reference is made to the paragraph entitled "Jurisdiction," in the petition for a writ of certiorari to which this brief is annexed.

(3) Statement of the Case.

A statement of the case will be found under the heading, "Summary Statement of the Matter Involved," in the petition for a writ of certiorari to which this brief is annexed. In the interest of brevity, the statement is not repeated in this brief.

(4) Specification of Errors.

It is submitted that the Circuit Court of Appeals for the Seventh Circuit erred in the following particulars:

(1) In interpreting the decision of *Gregory* v. *Helvering*, 293 U. S. 465, as calling for the disregard of the legal entity of a corporation, as separate from its stockholders, if income tax saving is a leading motive for its incorporation.

(2) In its attempted application of the principles of law announced in *Gregory* v. *Helvering* to a situation presenting issues dissimilar to those there decided, and not of the kind intended to be governed thereby.

(3) In professing to distinguish the decision of *Chisholm* v. *Commissioner*, 79 Fed. 2nd 14 (C. C. A. 2d Cir.) on the facts, when in respect to the facts the cases are exactly parallel.

(4) In treating the receipt of funds by a corporation, in a corporate transaction, as income to its sole stockholder, merely because of his complete control over the corporation.

(5) In assuming facts not supported by, and even in conflict with, the findings of fact of the United States Board of Tax Appeals.

(6) In arriving at a decision based on its own conclusions of fact, which are contrary to the conclusions of the Board and are not sustained by the record.

(7) In reversing the decision of the United States Board of Tax Appeals upon a question of fact.

(8) In failing to affirm the decision of the United States Board of Tax Appeals.

SUMMARY OF ARGUMENT.

1. The legal status of a corporation, as an entity distinct from its controlling stockholder, may not be disregarded merely because a tax saving motive attended its organization.

Gregory v. *Helvering*, 293 U. S. 465.
Smith v. *Higgins, Collector*, 102 Fed. 2nd 456 (C. C. A. 2nd Cir.).
Chisholm v. *Commissioner*, 79 Fed. 2nd 14 (C. C. A. 2nd Cir.), also 29 B. T. A. 1334.

2. The fact that a sole stockholder has practical control over the affairs of a corporation, does not justify treating the receipt of funds by it, in a corporate transaction, as individual income to him.

Burnet v. *Commonwealth Improvement Company*, 287 U. S. 415.
Dalton v. *Bowers*, 287 U. S. 404 (407-8).
Grand Rapids Trust Co. as Administrator, etc. v. *Commissioner*, 34 B. T. A. 170.
Smith v. *Higgins, Collector*, 102 Fed. 2nd 456 (C. C. A. 2nd Cir.), *supra*.

3. As to facts:

a. The findings of fact of United States Board of Tax Appeals, if sustained by substantial evidence, are conclusive upon the United States Circuit Court of Appeals.

Phillips v. *Commissioner*, 283 U. S. 589 (600).
California Barrel Co. v. *Commissioner*, 81 Fed. 2nd 190 (193) (C. C. A. 9th Cir.).

b. The Circuit Court of Appeals has no power to substitute its conclusions of fact for those of the Board of Tax Appeals.

Elmhurst Cemetery Company v. *Commissioner*, 300 U. S. 37 (40).

Helvering v. *Rankin*, 295 U. S. 123 (131).

ARGUMENT.

POINT I.

1. The legal status of a corporation, as an entity distinct from its controlling stockholder, may not be disregarded merely because a tax saving motive attended its organization.

In its opinion, the Circuit Court professes to recognize the principle that a taxpayer may properly consider tax results in determining the form of contemplated transactions; but it nevertheless denies the application of that principle to the instant case. Under Point III we call attention to the unauthorized liberty taken with the facts in attempting to justify this denial; but, passing for the moment factual questions, we here urge that there has been a misapplication of this Court's decision in *Gregory* v. *Helvering*, 293 U. S. 465.

The Circuit Court quotes an extract from that decision as the basis for treating a sale made by the controlled corporation as petitioner's individual transaction. It has been uniformly held that, in the absence of applicable legislation, corporate acts are not those of its stockholders for tax purposes. This is not the first case in which the Commissioner has sought to apply *Gregory* v. *Helvering* as changing this rule; a good judicial reply to such an effort is found in *Smith* v. *Higgins, Collector* (U. S. C. C. A. 2d Cir.), 102 Fed. 2nd 456:

> "Though the case just mentioned" (*Gregory* v. *Helvering*) "is relied on by the government it is not of help to it for it had to do with a pretended reor-

ganization not within the scope of that statute. The present case differs in that it involves a real sale to an actual buyer" (the wholly-owned corporation) (page 458).

In the instant case, the G. W. G. Corporation received and retained the proceeds of the sale of the stock it had acquired from petitioner; and it proceeded to use such proceeds in its business, which business still continued at the time of trial several years later. As stated by the United States Board of Tax Appeals, the Commissioner himself has not been consistent in his disregard of "the separateness of the corporation," and its "reality cannot be disregarded."

In the instant case, the Circuit Court denies that its decision conflicts with that of the Second Circuit in *Chisholm* v. *Commissioner* (79 Fed. 2nd 14), stating that the Court in that case "*found* that the purpose was to form an enduring partnership to invest and reinvest on a rather extensive scale" (Rec. 90).

That, too, was an appeal from the Board of Tax Appeals; and the Circuit Court of the Second Circuit evidently recognized the fact that it had no jurisdiction to find anything. It did, however, have before it a finding by the Board of Tax Appeals that:

> "The petitioners had considered the advisability of forming a partnership several months prior to this time, but had taken no steps to that end. It was formed at this particular time upon advice of their attorney for the purpose of avoiding income tax on the profit on the prospective sale of their Houde Engineering stock" (29 B. T. A. 1337-8).

The initial partnership capital consisted only of the contribution by each of the two partners of his 300 shares

(with a market value of $472,057) which were already under option of sale. The report is not clear as to what the partnership did with the proceeds of the sale of this stock after the option was exercised; but apparently it invested in other securities.

Can that finding and those facts be distinguished in principle from the following findings, which are binding on the Circuit Court in the instant case?—

> "The petitioner, prior to 1933, had had some thoughts relating to the formation of an investment corporation." • • • "He instructed Markheim, on January 9, 1933, to form an investment corporation."
>
> "G. W. G. Corporation was licensed to do business in the State of Illinois on February 11, 1933 pursuant to advice from Markheim that, although a license was not necessary for an isolated transaction, the license would be required if the corporation were to continue business in Illinois. The G. W. G. Corporation, in 1933 invested in various stocks other than the stock of the Oakridge Cemetery Corporation" (Rec. 61 & 64).

The Circuit Court states that the decision in the *Chisholm* case "turned on the question whether there was a genuine partnership or a mere mask for an individual transaction"; and concludes,—without any support either in finding or fact,—with the statement that "G. W. G. Corporation is not a genuine corporation but a mere mask."

Despite the effort in the opinion to reconcile its decision with previously decided cases, the Circuit Court has made a real departure from established principles by holding, in effect, that the tax motive involved is, of itself alone, sufficient ground for ignoring the existence of a separate corporate entity. Actually, the decision is in

square conflict with that of the Second Circuit in the *Chisholm* case, and a serious question is raised as to the effect of this Court's decision in *Gregory* v. *Helvering*.

POINT II.

The fact that a sole stockholder has practical control over the affairs of a corporation, does not justify treating the receipt of funds by it, in a corporate transaction, as individual income to him.

The Circuit Court's reference to petitioner's "corporate pocket" might be passed as a figure of speech. Its application, like the observation that "substance rather than form must control," depends on facts. Had the Court applied this figure consistently, it would have suggested the elimination, from taxpayer's individual income, of $31,436.15 of salary, dividends, and interest received from his corporation; and it would thereby have reduced the amount in controversy by about fifty percent.

The Court rightly states that petitioner was the "guiding and controlling genius," although it is not justified in saying that the transaction "was for his profit and not the corporation's," except in the same sense that every corporation exists for the ultimate benefit of its stockholders. The transaction provided the corporation with funds which it proceeded to use in a series of large and profitable investments (Rec. 59).

In *Dalton* v. *Bowers*, 287 U. S. 404, and *Burnet* v. *Commonwealth Improvement Company*, 287 U. S. 415, the taxpayers had sought to apply the same rule to reversed situations. It chanced to be to their advantage that the profits or losses of solely owned corporations should be treated as realized or sustained by them individually.

This court in those cases held otherwise, as indeed it has uniformly held on similar facts.

On this point we have cited *Grand Rapids Trust Company, as Administrator, etc.* v. *Commissioner*, 34 B. T. A. 170, because in that case the advantage sought, in the questioned transaction, was of exactly the same nature as that in this case. The petitioner's intestate had sold to a corporation, all of whose stock was owned by him and his immediate family, certain securities subject to an existing option for sale. This sale to the corporation was on an installment basis and the individual profits were being reported on an installment basis, despite the fact that the corporation had received cash from the exercise of the option. The Board held that this was proper, saying:

> "The separateness of Smith and the corporation as juristic entities and ~~also as~~ taxpayers cannot be disputed, and there is no evidence which would justify lack of recognition of either" (p. 171).

The latest decision, as to the tax effect of a transaction with an individually owned corporation, is *Smith* v. *Higgins, Collector*, (U. S. C. C. A. 2nd Cir.) 102 Fed. 2d 456, in which the Court said:

> "However closely the plaintiff controlled Innisfail as its sole stockholder, and he was also its president, it is clear that that corporation had for years before this transaction bought, sold and held, and did afterwards buy, sell and hold, large amounts of securities. It had a business existence and was a corporate entity separate and distinct by itself with assets and liabilities of its own apart from those of its sole stockholder. *And the fact that it had but one stockholder did not prevent its having such a separate legal status.*

Burnet v. *Commonwealth Improvement Co.*, 287 U. S. 415. * * * As such a corporation, it was in law a legal person whose acts were its own in making the purchase of these securities and when the purchase was made and the shares transferred to it Innisfail was the sole owner of them. * * * The existence of a motive to reduce or avoid taxation by making a valid sale is of no consequence for the plaintiff had the right to give effect to that purpose by whatever lawful means he had available. *Gregory* v. *Helvering*, 293 U. S. 465" (Rec. 457-8).

POINT III.

The Circuit Court's decision is based both on assumptions of fact contrary to the Board's findings, and on the Court's own unfounded conclusions of fact.

Determinations of fact by the United States Board of Tax Appeals are conclusive if sustained by substantial evidence. *Phillips* v. *Commissioner*, 283 U. S. 589 (600). This is true even though the determinations be not stated as formal findings. *California Barrel Co.* v. *Commissioner*, 81 Fed. 2d 190 (193).

The first two paragraphs which follow are from the Board's formal findings in the instant case, the third, which also involves determination of fact, from its opinion:

"The petitioner, prior to 1933, had had some thoughts relating to the formation of an investment corporation or association similar to that known as The John Griffiths Investment Trust." (This Trust is referred to in the record as existing for some years before the questioned transaction.) "He instructed Markheim, on January 9, 1933, to form an investment corporation as Markheim had suggested" (Rec. 61).

"The G. W. G. Corporation in 1933 invested in various stocks other than the stock of the Oakridge Cemetery Corporation" (Rec. 64). (This finding is based on evidence detailing the corporation's investments in the year 1933, from which it appears that, in that year alone, it invested $179,762.50 in securities other than those of the Oakridge Cemetery Corporation. See tabulation at Rec. 59.)

"It" (the corporation) "paid a salary and dividends to the petitioner, which he reported in his income tax return. It paid him interest on the unpaid purchase price, which he may have reported on his income tax return. The Commissioner has not eliminated the salary and interest, as should be done if the separateness of the corporation is to be ignored. The steps taken and the reality of the corporation cannot be disregarded" (Rec. 67).

In the following quotation from the Circuit Court's opinion, we italicize statements of fact which, we submit, not only are contrary to the Board's findings, but are without support in the record:

"Here, as there, *the sole object* was the consummation of a preconceived plan *not to organize a corporation for a business purpose*, but merely as a step in the contrivance to escape taxation. *It performed, as was intended from the beginning, no other function, with the possible exception* of the subsequent transaction some business not inconsistent with the scheme of which it was a part" (Rec. 88).

"We are presented with a situation in which the taxpayer and his counsel intentionally *formulated a contrivance for the sole purpose* of enabling the taxpayer to avoid the payment of tax" (Rec. 87).

It cannot help to say that the Circuit Court was merely drawing conclusions. These certainly are not conclusions of law, but at best are on a par with the Court's final conclusion of fact, that:

> "It is our view that what was done, including the corporate organization, was a mere mask to cover the real transactions" (Rec. 90).

In the recent decision of *Elmhurst Cemetery Company* v. *Commissioner*, 300 U. S. 37, this Court thus expressed a ground for reversing a decision by this same Circuit Court:

> "This action, we think, amounted to an unwarranted substitution of the Court's judgment concerning facts for that of the Board." (Page 40.)

In the earlier case of *Helvering* v. *Rankin*, 295 U. S. 123, this Court said:

> "If the Board has failed to make an essential finding" • • • "the proper procedure is to remand the case for further proceedings before the Board." (p. 131.)

CONCLUSION.

The decision in *Gregory* v. *Helvering* has eliminated a multitude of technical devices which were masquerading under the title of "reorganizations;" but we submit that this great service will be largely offset by the resulting judicial confusion if the case is permitted to become the justification for disregarding corporate existence whenever such disregard produces a result which appeals to the particular Board or Court before which the question arises.

If judicial encroachments on the fact-finding province of quasi-judicial bodies are to be countenanced, their bounds must be defined.

In both respects the case at bar would appear to call for the elimination of the conflict in opinion between Circuit Courts of Appeals, by the final decision of this Honorable Court.

Respectfully submitted,

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